JUL 22 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

80-5212

IN THE

SUPREME COURT OF THE UNITED STATES

FALL TERM 1979

No. _____

RECEIVED
AUG 11 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

R. KEITH PIKE, ET AL., Plaintiffs, Appellees,

vs.

LYLE H. PRENZLER, Defendant, Appellant, Cross-Complainant

VERA KAMRATH, ET AL., Cross-Defendants, Appellees.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Lyle H. Prenzler, hereby motions to proceed in forma pauperis and supports said motion under 28 U.S.C. 1915, especially 1915(d) for appointment of counsel to aid in procedural process, by attached affidavity.

Dated: July 30, 1980

LYLE H. PRENZLER,
715 East Chapman Avenue
Orange, California 92666
714 639 1701

80-5212

RECEIVED
JUL 22 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

RECEIVED
AUG 1 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

No. _____

AFFIDAVIT RULE 53

IN SUPPORT MOTION FORMA PAUPERIS

STATE CALIFORNIA )
) SS.
COUNTY ORANGE )

I, Lyle H. Prenzler, being duly sworn, depose and say:
I am the appellant in the above entitled cause, and support my application for leave to proceed without being required to prepay costs or fees, state:

1. I am a pauper, in part, because of the action her in
2. I believe I am entitled to redress and my cause is meritorious and unable to prepay costs, provide surety, and provide necessities of life for my family.
3. The nature of the cause, in brief, is a denial of injunctive relief, a denial of open hearing, and redress and whether I have been denied my Constitutional Rights and violation of Federal Statutes in regard to Interpleader and denial of civil rights under color of State Statutes by State Officials, where a false affidavit of Service of Summons has been declared against serving Officers in Pennsylvania and Arizona, and for entry of false judgments in Arizona sued in California where I have entry of void judgments while removed 28 U.S.C. 1446.

LYLE H. PRENZLER
DATE AUGUST 4, 1980

NOTARY PUBLIC
MY COMMISSION EXPIRES
Dolores Gindlestone
April 5, 1981

OFFICIAL SEAL
DOLORES GINDLESTONE
NOTARY PUBLIC — CALIFORNIA
PRINCIPAL OFFICE IN
ORANGE COUNTY
My Commission Expires April 5, 1981

RECEIVED
AUG 11 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

RECEIVED
JUL 22 1980
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SUPREME COURT, U.S.

# 80-5212

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1979

No._____

R. KEITH PIKE, ET AL.,

Plaintiffs, Appellees,

vs.

LYLE H. PRENZLER,

Defendant, Appellant,

VERA KAMRATH, ET AL.,

Cross-Defendants, Appellees.

## JURISDICTIONAL STATEMENT

### RULE 15

### OPINIONS BELOW

Appellant Lyle H. Prenzler, mailed a Motion for Relief of Judgment, Orders, Proceedings, Vacating from the Middle East on May 31, 1979, entered against appellant on September 18, 1979 in the Superior Court of Orange County California, which was heard without appearances or oral arguments by Honorable Robert C. Todd on August 17, 1979, denying Motion without specification. This appeal is from the final order of the Court of Appeals State of California Fourth District, dated February 13, 1980, petition for hearing denied in the California Supreme Court of April 24, 1980. (Appended 1,2,3). The Notice of Appeal to the Supreme Court of the United States was filed with the Court of Appeals of the State of California on April 29 1980. (Appended 4)

### JURISDICTION

This appeal involves question validity of multiple state statutes of California on ground of their being repugnant to the Constitution or laws of the United States et al., 28 U.S.C. 1257(2), 1252, 2103, 2104, and decision in favor of validity in which original jurisdiction involves the Federal Courts pursuant to 28 U.S.C. 1343, 42 U.S.C. 1983, 1985 and 28 U.S.C. 1335, 2361, 1963, 1695 and venue as in Amendment XIV and Article 3 & 4 U.S. Constitution, also 28 U.S.C. 1391, 1397, 1441(b) and 1443(1), and in denial by Clerk's error Federal Rules of Civil Procedure Rule 60(a) where a

Writ of Mandate to compel jurisdiction of March 29, 1979 has not been heard in the same State court, and removal under 28 U.S.C. 1441 and 1443 denied and there is no redress except by this appeal. Substantive due process has been denied by levying on the same persoanl property and real estate of appellant in Arizona and California and judgments and jeopardy compounded thereby by multiple vexations for same liabilities. An Order quashing service of summons as herein is appealable. Fielding v. Superior Court (1952) 111 CA2d 490. Service of Summons as new evidence has been had pursuant to Cal. Cod. Civ. Proc. 415.30, 415.40 and the affidavit of the serving officers in Pennsylvania & Arizona has been declared fraudulent by the decision of the Court which has been denied vacation herein, in that quash summons permitted for failure to serve summons with complaint, and is taken under color of state law within meaning of 42 U.S.C. S. 1983 and confers federal jurisdiction under 28 U.S. C.S. 1343. Carrasco v. Klein (1974DCNY) 381 F.Supp. 782. Cal. Cod. Civ. Proc. 418.10. Further judgments and Orders have been had in the State Court while removed and appealed pursuant to Cal. Cod. Civ. Proc. 916(a) and appropriate federal statutes re stay on appeal and removal, and Cal. Cod. Civ. Proc. 1710.40(a), 1710.55(b) 1713.4,(a, b) 1713.6. Appellant has been denied equal protection of laws, open hearing, hearing on the merits, notification and appearances herein and thus brings this appeal.

The cases believed to sustain the jurisdiction are:

1. Mississippi Power and Light v. Jackson(1935) DCMiss 80 P 564;
2. Williams v. Gilmore (1942) 51 CA2d 684;
3. Parks v. Mr. Ford (1974) DCPa 386 F.Supp. 1251;
4. Roberts v. Acres(1974) Ca7111; 495 F2d 57;
5. DeKalb Co. v. Southern Bell Telegraph & Telephone Co. (1972) DCGa 385 F. Supp. 498;
6. State v. Draper 83 Utah 115; 27 P2d 39;
7. Western Union Telegraph v. Commonwealth of Pennsylvania (1961) 368 U.S. 71.

The date of judgment of the Court of Appeals of February 13, 1980 and California Supreme Court of April 24, 1980 is presently sought to be reviewed.

Procedural due process has been invoked to deny appeal for failure to pay for transfer of record on time and by excusable negligence by appellant. Substantive due process has been denied by failure to reply to Writ of Mandate to assume jurisdiction and by abuse of discretion to permit amendment, vacation of judgment and consolidate actions, by dismissal and failure to provide injunctive relief all in denial of equal protection of laws et al. to this citizen of the United States.

QUESTIONS PRESENTED

1. Whether the serving officer of summons and complaint for which dismissal of cross complaint, rescission, and indispensable parties allowed while permitting entry of deficiency judgment against appellant and denying consolidation was a false affidavit executed by a duly licensed process server in Arizona&Pennsylvania
2. Whether the denial of motion for relief of judgment, orders, prodeedings, vacating judgment was a denial of due process under color of state statute as the action of a state official which was not required by state law, but can be "under color state law" by virtue of official nature of action taken. White v. Matthews (1976) DCSD 420 F.Supp. 882, when there were elements of failure to notify; fraud, extrinsic and intrinsic void; new evidence; and independent action and excusable neglect by failure to have appearances and representation by attorneys for appellant pursuant to Federal Rules of Civil Procedure Rule 60(b), for clerial error 60(a) as above? Cal. Cod. Civ. Proc. 386
3. Whether because there are interpleader statutes in California, Cal. Cod. Civ. Proc. 386; res judicata subject matter jurisdiction; there is stautory and Rule persona jurisdiction and service process and original jurisdiction of federal courts and venue in California, and appellant has been denied his rights privileges, and immunities herein under U.S.Constitution incldiung those cited above and due process, redress, open hearing, trial on the merits?

3. Whether the judgments and orders herein, under color state statutes cited and not cited, without specification, by ruling of their validity are not thereby repugnant to the Constitution or laws of the United States?

4. Whether the denial of vacation in view of new evidence of service of summons with complaint by registered mail and by personal service at place of business pursuant to Cal. Cod. Civ. Proc. 415.20 & 415.40 of the judgment of September 1978 for failure to serve summons with complaint as reason for lack of personal jurisdiction, and no other, is not a denial of right to equal rights of a citizen of the United States, as well as a denial of consolidation and amendment or in the nature, thereof?

## STATEMENT OF THE CASE

CCP 657

This appeal is from a denial of a motion to vacate where there was introduced new evidence of service of process to confront the "false affidavits" executed by process servers in two states upon which the dismissal of cross complaint was had in denial of redress of deficiency judgment from Arizona brought in California and denial of restitution of misrepresentation of real estate sale which is oneof multiply vexatious actions brought for same rem against appellant for a fraudulent amount, and void at its inception for procedural error in Arizona, and for denial of Writ of Mandate by Clerk's error all of which with denial of removal deny this appellant all redress where there is denial of fair hearings, appearances and representation in Arizona and convenience to appellant, where there has been no specification, but the actions of the court refer to state statutes that by the Orders within act as a validation of these same state statutes and repugnant to U.S. Constitution, by state officials acting under official nature of action taken, and for "false" affidavits of service of summons on defendant in civil action so validated by the same judgments and orders and denial of Motion for Relief and vacation; all while deficiency judgment has been ruled within jurisdiction of this court and entered while this action appealed and removed?

## THE FEDERAL QUESTIONS ARE SUBSTANTIAL

The reasons why the questions presented are so substantial as to require plenary consideration is that the cited state statutes are repugnant to the U.S.Constitution if the orders so ruled on are valid, in denial of equal protection of the laws, in which there a class of co-conspirators, and separately; conspiring to deny this citizen equal protection of the law; and this appeal is the only redress which appellant has. There is pending a request before the judicial panel on multi-district litigation pursuant to 28 U.S.C. 1407. Included in the above ruling as to validity of state statutes in these orders is the question as to whether the action of state official, the judges herein, were required by state law, if their judoment rules repugnant to U.S. Constitution and whther the affidavits of state official in Pennsylvania and Arizona were"false", or whether the ruling as to their falsity herein does not demand redress? The denial of the Writ of Mandate and Appeal must be error of the Court and clerical error or excusable neglect by appellant which should not because for dismissal and denial of trial on the merits. The constitutional challenges raised by this appeal are substantial and important to all citizens affected by such statutes--present or future, and such as to bring the rulings and case within the jurisdictional provisions relied on and the cases cited. The fede al courts have jurisdiction of these matters and it is questionable whether the multiple lawsuits on same liabilities by multiple litigants were not meant by this state action to deny appellant redress in a multi-district action and this ruse perpetuated by denial of removal by the district court.

## CONCLUSION

For all these reasons this case should be reviewed on its merits.

LYLE H. PRENZLER IN PRO SE
715 East Chapman Avenue
Orange, CAlfironai 92666

June 16, 1980

☐ Assigned from Dept. No. _____

Clerk Dorothy Curry Reporter S. Guevara Dept. 38 Date 8-17-79

Title PIKE VS PRENZLER Case No. 29-20-61

| ATTORNEY(S) | *FOR** | | ATTORNEY(S) | *FOR** | |
|---|---|---|---|---|---|
| 1. No Appearance | D | | 4. | | |
| 2. | | | 5. | | |
| 3. | | | 6. | | |

*A = Petitioner; B = Plaintiff; C = Respondent; D = Defendant; E = Cross-Complainant; F = Cross-Defendant; G = Intervenor; U = Real Party in Interest **Indicate Parties Appearing by Inserting "X".

☒ Motion ☐ Demurrer ☐ Petition ☐ Order to Show Cause ☐ Application ☐ of *** 1 to For Relief of Judgment, Orders, Proceedings and Vacating

☐ Continued to _____ at _____ m. in Dept. _____.

☐ Granted ☒ Denied ☐ Ordered Off-Calendar ☐ Taken Under Submission ☐ With ☐ Without Prejudice

**COURT FINDS AND/OR ORDERS:**

A. ☐ Trial date of _____ ☐ to remain; ☐ vacated and case set for trial on _____, at 9:00 a.m. in Dept. 1.
☐ Trial Setting Conference set for _____ at _____ m. in Dept. 1.
☐ Estimated time of trial _____ days.
☐ Jury ☐ not requested ☐ requested by*** _____.
☐ Jury fees ☐ deposited 14 days prior to trial; ☐ forfeited; ☐ carried forward; ☐ refunded to*** _____
☐ Notice waived; ☐ Notice to be given by*** _____.

B. ☐ Further answers to ☐ interrogatories ☐ requests for admissions _____ within _____ days.
☐ Sanctions paid by*** _____ to*** _____ in amount of _____ payable _____.
☐ Physical examination ☐ inspection and production of documents on _____ at _____ m. at _____.

☐ Matter dismissed conditionally, dismissal may be vacated if answers are filed and served and sanctions paid within _____ days.
☐ Writ to issue.

C. ☐ Sustained as to _____ causes of action.
☐ _____ days ☐ without leave ☐ to amend.
☐ Overruled as to _____ causes of action.
☐ _____ days ☐ without leave ☐ to answer.
☐ Stipulation approved and made order of Court.
☐ Bond of $ _____ to be posted by _____.
☐ Judgment Debtor sworn for examination.
☐ Notice waived; ☐ Notice to be given by *** ___.
☐ Temporary Restraining Order to remain in effect until continuance date.

***Indicate party by inserting number appearing to left of Attorney's name.

☒ Clerk to give notice by copy of this minute order.

| STATISTICAL CODE USE ONLY | 1. | 2. | 3. | 4. | 5. | 6. | 7. | 8. | 9. | 10. | 11. | 12. | 13. | 14. | 15. | 16. |
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# LAW AND MOTION MINUTE ORDER

(Continued on reverse side)

R. KEITH PIKE, et al.,

Plaintiff

vs.

LYLE H. PRENZLER

Defendant

FILED
JAN - 7 1980
LEE A. BRANCH, County Clerk
By _____ Deputy

SUPERIOR NO. 292061
4 CIVIL NO. 21815

NOTICE OF DEFAULT

TO: Lyle H. Prenzler
In Propria Persona
715 East Chapman Ave.
Orange, Ca. 92666

Court of Appeal-Fourth District
Division II - State Building
303 West Third Street
San Bernardino, Ca. 92402

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE THAT the appeal in the above entitled case is now in default on and after December 31 19 79 for failure to:

☐ Timely file designation of the record. (Rules 4 and 5)

☒ Timely deposit costs for preparing the record. (Rule 5c and 5d)

☐ Timely file Settled Statement in Narrative Form. (Rule 7)

☐

In accordance with California Rules of Court 10(c) you are hereby notified that the appeal will be dismissed unless good cause is shown to the reviewing court within 15 days from the mailing of this notice.

Motion for Relief Denied 1-10-80

Lee A. Branch, County Clerk

By Anthony A. Thompson
Deputy

Anthony A. Thompson
Appellate Division

CERTIFICATE OF MAILING

I, the undersigned, a Deputy Clerk of the Superior Court of the State of California for the County of Orange, and not a party to the within action hereby certify: That on January 7, 1980 I served the foregoing notice on the parties whose names first appear hereinabove, addressed as therein shown, by depositing true copies thereof inclosed in sealed envelopes with postage thereon fully prepaid in a United States Postal Service mail box at Santa Ana, California.

Dated: January 7,1980

Anthony A. Thompson
Deputy Clerk

Anthony A. Thompson
Appellate Division

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ORANGE

| | |
|---|---|
| R. KEITH PIKE<br><br>Plaintiff<br><br>vs<br><br>LYLE H. PRENZLER<br><br>Defendant. | SUPERIOR COURT NO. 292061<br><br>FOURTH CIVIL NO. 21815<br><br>CERTIFICATE OF THE CLERK OF THE SUPERIOR COURT PURSUANT TO RULE 42(b) CALIFORNIA RULES OF COURT |

I, LEE A. BRANCH, County Clerk and Clerk of the Superior Court of the State of California, for the County of Orange, do hereby certify:

I

That on June 12, 1978, "Application For Entry of Judgment on Sister State Judgment" was filed and judgment on Sister State Judgment was entered as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiffs, R. Keith Pike, Josephine Pike, Karl Menath and Marguerite Menath, shall recover from Defendant, Lyle Prenzler the following sums:

1) $17,500.60 as the amount remaining unpaid on the sister state judgment;

2) $51.00 in costs;

3) $870.36 in interest which accrued at the rate of 6% between the date of the filing ofthis judgment in Arizona and May 23, 1978, the date of the application for entry of judgment on sister state judgment; interest at the rate of 6% from May 23, 1978 on the unpaid principal balance of the judgment to the date of satisfaction of this judgment.

///

II

That the attorneys of record are as follows: Lyle H. Prenzler, In Pro Per; Bretz & Hennigan for Cross-Defendant, Vera Kamrath & Homer J. Reed; Higgs, Fletcher & Mack for Plaintiffs and Cross-Defendants, R. Keith Pike and Josephine Pike, Karl Manath & Marguerite Menath.

III

That on August 17, 1979, a Minute Order was entered by the Superio Court as follows:

"Motion For Relief of Judgment, orders, proceedings and vacating is denied."

/ / /

IV

That no Motion for New Trial was filed in this action

V

That on Oct. 10, 1979 a Notice of Appeal to the Fourth District Court of Appeal was filed.

VI

That

(xx) Appellants designation of the record on appeal was filed on October 22, 1979

( ) Respondents designation of the record on appeal was filed on

( ) Fees for preparation of the record on appeal were deposited by appellant on

( ) No designation of the record on appeal has been filed and the time to file the designation has expired.

(x) No fees for the preparation of the record on appeal have been deposited and the time to deposit the fees has expired.

( )

( )

That

( ) Proceedings for the preparation of the record on appeal are pending in the Superior Court.

(XX) No proceedings for the preparation of the record on appeal are pending in the Superior Court, and that the time to institute any such proceedings has expired.

( )

( )

( )

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of the Superior Court of the State of California in and for the County of Orange this 29th day of January 1980.

LEE A. BRANCH, County Clerk and Clerk of the Superior Court of the State of California for the County of Orange.

BY Anthony A. Thompson
Anthony A. Thompson Deputy
Appellate Division

Brain tumor vaporized
by carbon dioxide laser

A 23-year-old w

R. KEITH PIKE, ET AL,

Plaintiffs, Respondents,

vs.

LYLE H. PRENZLER,

Defendant, Appellant,

VERA KAMRATH, et al.,

Cross-Defendants,
Responents.

ISTRICT STATE CALIFORNIA

NO. 21815
SUPERIOR COURT COUNTY
292061

NOTICE TO THE COURT

Appellant, Lyle H. Prenzler, protests and takes exception to the Clerk's Certificate submitted in said cause, as failing to note cross complaint by appellant, rescission and restitution of contract; also failing to note the separation of cross defendants and plaintiffs, and further failing to note that dismissed parties were dismissed only for lack of service of summons with complaint although notification adequate, and summonses have been served.

Dated: January 30, 1980

LYLE H. PRENZLER PRO SE

# COURT OF APPEAL—STATE OF CALIFORNIA

## FOURTH APPELLATE DISTRICT

COURT OF APPEAL - FOURTH DIST.
FILED
FEB 13 1980
ROBERT L. FORD, Clerk
Deputy Clerk

DIVISION TWO

R. KEITH PIKE, et al
Plaintiffs, Respondents,

vs.

LYLE H. PRENZLER,
Defendant, Appellant,

VERA KAMRATH, et al.,
Cross-Defendants, Respondents.

4 Civ. NO. 21815

Orange COUNTY NO. 292061

THE COURT:

The petition for relief from default is DENIED.
The appeal is DISMISSED.

McDaniel, J.
Acting Presiding Justice

C.C.
Orange County Clerk, 700 Civic Center Dr.West, Santa Ana, Ca. 92701
Lyle H. Prenzler, 715 East Chapman Ave., Orange, Ca. 92666
Bretz & Hennigan, 124 Laskey Drive, Beverly Hills, Ca. 90212
Higgs, Fletcher & Mack, 1800 Home Tower, 700 Bdwy., San Diego, Ca.

COPY

CLERK'S OFFICE, SUPREME COU
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102

*I have this day filed Order*

*In re:* 4/cv. *No.* 21815

PIKE

*vs.*

Prenzler

*Respectfully,*

G. E. BISHEL
*Clerk*

Orange, California 92666
714 639 1701

COURT OF APPEALS STATE OF CALIFORNIA DISTRICT FOUR

R. KEITH FIKE, ET AL.,
Plaintiffs, Appellees,
vs.
LYLE H. FRENZLER,
Defendant, Appellant.

Case No. 21815
[illegible] 292061
NOTICE OF APPEAL

LYLE H. FRENZLER, appellant, hereby appeals the Order of April 24, 1980, in the above causes to the Supreme Court of the United States, denying Petition for Hearing in the Supreme Court of the State of California, for denial of equal protection of the laws, under cover of state statute, repugnancy to Constitution, and conspiracy by a class of co-conspirators to deny this appellant right to equal civil rights in pursuit of injunctive relief.

Dated: April 28, 1980

Respectfully submitted,

LYLE H. FRENZLER
APPELLANT

but has not been named as a party. 28 U.S.C. 2403 may be applicable, and 28 U.S.C. 451 constitutionality of acts of [illegible] by depositing in U.S. Mail

three sentences which prior to this amendment.
Unless the court otherwise directs and subject to
Rule 54(b), judgment upon the verdict of the jury
forthwith by the clerk; but the court shall direct
judgment to be entered upon a special verdict or
verdict accompanied by answers to interrogatories
pursuant to Rule 49. When the court directs
only money or costs or that all relief be denied,
judgment forthwith upon receipt by him of the
the court directs entry of judgment for other
promptly settle or approve the form of the
ered by the clerk. The notation
as provided by Rule 79(a) consti-
and the judgment is not effective

sports enthusiasts, according to a statement sent to congress by the federal Fish and Wildlife Service. In its report, the service explained that the manatee—an animal believed responsible for the mermaid myths—has been dwindling in numbers, and only about 1,000 of the slow-moving mammals remain in Florida waterways, one of their last refuges. "Nearly every living manatee," the

used oil could be recycled, or used as a feedstock in the manufacture of other products."

## For the Record

In an Associated Press story that ran in Wednesday's Times, it was incorrectly reported that the Lawrence Livermore Laboratory's main reactor was ordered shut down in 1977 because of the finding of a potential

:DGMENTS

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tion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

**(c) Motion to Alter or Amend a Judgment.** A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

As amended Dec. 27, 1946, eff. March 19, 1948; Feb. 28, 1966, eff. July 1, 1966.

**1966 Amendment**

In subdivision (d), deleted from the end of the first sentence the words "and in the order shall specify the grounds therefor", and added the second and third sentences.

### Rule 60.

### RELIEF FROM JUDGMENT OR ORDER

**(a) Clerical Mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

**(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does

207 an order denying a new trial. Kaiser v. Dalto (1903) 73 P. 828, 140 C. 167.

new r to and erty

A judgment sustaining a demurrer cannot be reviewed on an appeal from an order denying a motion for a new trial since the demurrer raised only questions of law, and a new trial is defined by this section to be a re-examination of an issue of fact in the same court. Jones v. Chalfant (1900) 60 P. 572, 128 C. 224.

and rog- uffi- that Par- r.

The supreme court, upon an appeal from an order denying a new trial, can consider only the sufficiency of the evidence to support the findings, and not the sufficiency of the findings to support the judgment. Brison v. Brison (1891) 27 P. 186, 90 C. 353.

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17. Waiver of right to new trial

Where error intervenes in the record, the power of trial court to grant a new trial is not limited by conduct of parties in inviting such error. Chavez v. Perez (1944) 148 P.2d 680, 64 C.A.2d 217.

The offering of an instruction on an issue may constitute a "waiver" of the right to urge that the giving of similar instructions was error, but the rule does not restrict the trial court's power to grant a new trial. Springer v. Sodestrom (1942) 129 P.2d 420, 54 C.A.2d 704.

al as sone ction nd it which ourt. Par- A.2d

Where intervener in stockholder's derivative suit joined corporation in stipulation under which corporation's right to move for a new trial was waived, intervener "waived" any right she may have had as a stockholder to move for a new trial on behalf of corporation. Chase v. Superior Court of Los Angeles County (1942) 127 P.2d 970, 53 C.A. 572.

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Where intervener in stockholder's derivative suit had joined with corporation in stipulation under which corporation's right to move for new trial was waived and where trial court had fixed total attorneys' fees and apportioned them between attorneys for plaintiff and intervener, intervener's motion for new trial, which sought relief only against other counsel and to increase the proportion of the fee awarded intervener's attorneys, was purely personal to intervener and trial court was without jurisdiction to entertain the motion. Id.

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Where only instruction requested by defendants on subject of limitation of actions constitutes a waiver of the plea, and such instruction is given, the defense cannot be reinstated thereafter on motion for new trial. Hartman Ranch Co. v. Associated Oil Co. (1937) 73 P.2d 1163, 10 C. 2d 232.





Generally, acceptance of fruits of judgment constitutes renunciation of right to move for new trial. Weld v. League of Cross of Archdiocese of San Francisco (1930) 290 P. 460, 107 C.A. 344.

Where distinct causes of action were not dependent and retrial as to one would not affect others, acceptance of amount of judgment held not waiver of right to prosecute motion for new trial. Id.

Stipulation by which plaintiff agreed to proceed with trial on date named, whether or not he was ready to proceed, was not to waive his right to ask for new trial. Blankman v. Parsons (1925) 238 P. 728, 73 C.A. 218.

## § 657. Relief available on motion for new trial; causes; specification of grounds and reasons; new trial for insufficient evidence; manner of making and entering order; appeal

The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party:

1. Irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial.

2. Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors.

3. Accident or surprise, which ordinary prudence could not have guarded against.

4. Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

5. Excessive or inadequate damages.

6. Insufficiency of the evidence to justify the verdict or other decision, or the verdict or other decision is against law.

7. Error in law, occurring at the trial and excepted to by the party making the application.

When a new trial is granted, on all or part of the issues, the court shall specify the ground or grounds upon which it is granted and the court's reason or reasons for granting the new trial upon each ground stated.

A new trial shall not be granted upon the ground of insufficiency of the evidence to justify the verdict or other decision, nor upon the ground of excessive or inadequate damages, unless after weighing the

# Chapter 4

# SERVICE OF SUMMONS


| Article | | Section |
|---|---|---|
| 1. | General | 413.10 |
| 2. | Persons Who May Serve Summons | 414.10 |
| 3. | Manner of Service of Summons | 415.10 |
| 4. | Persons Upon Whom Sunimons May Be Served | 416.10 |
| 5. | Proof of Service | 417.10 |


*Chapter 4 was added by Stats.1969, c. 1610, p. 3363, § 3, operative July 1, 1970.*

## Article 1

## GENERAL


Sec.

413.10 Law governing service.
413.20 Service by mail; time not extended.
413.30 Procedure when no provision made for service; proof of service.
413.40 Service in violation of law govering process servers.
414. Repealed.


*Article 1 was added by Stats.1969, c. 1610, p. 3363, § 3, operative July 1, 1970.*

**Cross References**

Quiet title action, service under this chapter on dissolved, suspended or forfeited corporation, see Corporations Code § 2205.1.

**Library References**

Process ⇨48 et seq. C.J.S. Process § 25.

## § 413.10 Law governing service

Except as otherwise provided by statute, a summons shall be served on a person:

(a) Within this state, as provided in this chapter.

(b) Outside this state but within the United States, as provided in this chapter or as prescribed by the law of the place where the person is served.

(c) Outside the United States, as provided in this chapter or as directed by the court in which the action is pending, or, if the court before or after service finds that the service is reasonably calculated to give actual notice, as prescribed by the law of the place where the person is served or as directed by the foreign authority in response to a letter rogatory.

(Added by Stats.1969, c. 1610, p. 3363, § 3, operative July 1, 1970.)

**Comment—Judicial Council**

Section 413.10 governs service of process within and outside this state, with one exception: special methods for effectuating service that are authorized by other statutes of this state may be used in appropriate instances. For a comprehensive list of these statutes, see Horowitz, Bases of Jurisdiction of California Courts to Render Judgments Against Foreign Corporations and Non-Resident Individuals (1958) 31 So.Cal.L.Rev. 339, 347, 356–358.

Service of process is the means by which a court having jurisdiction over the subject matter asserts its jurisdiction over the party and brings home to him reasonable notice of the action. (See, *e. g.*, United Office and Professional Workers, etc. v. Smiley (D.C.Pa.1946) 75 F.Supp. 695; Sechrist v. Palshook (D.C.Pa.1951) 97 F.Supp. 505.) Generally speaking, the methods enumerated under Article 3 of this chapter may be used within or outside this state to effectuate service upon corporate and noncorporate entities and individuals. Subdivision (b) provides an alternative method for effectuating service outside this state but within the United States, namely, in the manner prescribed by the law of the place where the defendant is served.

Subdivision (c) provides still other alternative methods of service, which are limited to service within the borders of a foreign country. These include service in the manner prescribed by the law of the place where the defendant is served or in the manner directed by a foreign authority in response to a letter rogatory. To insure that due process requirements are met when service is made by these methods, however, the California court in which the action is pending must find, before or after service, that the foreign method of service is reasonably calculated to give actual notice (*cf.* Uniform Interstate and International Procedure Act § 2.01, subd. (a); see generally Milliken v. Meyer (1940) 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278, 132 A.L.R. 1357.) If the court finds that such methods are constitutionally defective, it may impose such additional requirements as would make such service acceptable. (Subdivision (c).)

By authorizing a series of alternative methods of service, Section 413.10 permits accommodation to the policies and procedures of sister states and foreign countries. Careful study of foreign law may show that service would less likely be objected to, or could be more easily made, if effected in a manner prescribed by foreign law or by a foreign authority in response to a letter rogatory. (See generally Smit and Miller, International Co-operation in Civil Litigation—A Report on Practices and Procedures

Plaintiff's attorney is not "party to action" and is competent to serve summons. Sheehan v. All Persons, etc. (1937) 252 P. 327, 80 C.A. 393.

Though such authority is not conferred by statute, the court, by virtue of its original jurisdiction, has the power to appoint a special officer to execute its process. Wilson v. Roach (1854) 4 C. 362.

**8. Effect of service by party**

If husband seeking divorce had filed affidavit to effect that he personally had served the summons and complaint rather than that daughter of the parties had done so, wife's default could not have been entered, in view of this section providing that a summons may not be served by a party to the action. Sullivan v. Sullivan (1967) 64 Cal.Rptr. 82, 256 C.A.2d 301.

Under this section, husband's service of summons and complaint on wife in his divorce action was void although daughter of the parties witnessed service and was capable of making it and although she signed affidavit of service. Id.

**6. Receipt of papers**

Superior court did not acquire jurisdiction over person of wife from whom husband sought divorce and on whom he invalidly served summons and complaint, although she actually received the papers. Sullivan v. Sullivan (1967) 64 Cal.Rptr. 82, 256 C.A.2d 301.

A decree in foreclosure taken by default, and a sale thereunder, where actual service was made on defendants, and the record shows on its face that it was by one having authority, were not invalid because the summons was in fact served by one without authority, until reversed or set aside. Bank of Orland v. Dodson (1899) 59 P. 544, 127 C. 208, 78 Am.St.R. 42.

## § 415. Repealed by Stats.1969, c. 1610, p. 3373, § 16, operative July 1, 1970

**Historical Note**

The repealed section, enacted in 1872, amended by Stats.1933, c. 744, p. 1867, § 21, derived from Stats.1851, c. 5, p. 86, §§ 33, 34, related to proof of service of summons. See, now, § 417.10.

The repealed section was amended by the 1901 revision act, Stats.1901, c. 102, p. 131, § 65. However, on the authority of Lewis v. Dunne (1901) 66 P. 478, 134 C. 291, 55 L.R.A. 833, 86 Am.St.R. 257, the 1901 revision act was unconstitutional and void.

Operative date and effect of act on pending proceedings, see Historical Note under § 410.10.

## Article 3

## MANNER OF SERVICE OF SUMMONS

Sec.

415.10 Personal delivery of copy of summons and complaint.
415.20 Leaving copy of summons and complaint at office, dwelling house, usual place of abode or usual place of business; mailing copy.
415.30 Service by mail.
415.40 Service on person outside state.
415.45 Unlawful detainer; commercial property; service by posting; conditions.
415.50 Service by publication.
416 to 416.3 Repealed.

*Article 3 was added by Stats.1969, c. 1610, p. 3363, § 3, operative July 1, 1970.*

**Cross References**



**Law Review Commentaries**

Legislative changes in service of process. (1969) 10 Santa Clara L. 192.

**Library References**

Process ⇐64. C.J.S. Process §§ 34, 36.

## § 415.10 Personal delivery of copy of summons and complaint

A summons may be served by personal delivery of a copy of the summons and of the complaint to the person to be served. Service of a summons in this manner is deemed complete at the time of such delivery.

(Added by Stats.1969, c. 1610, p. 3363, § 3, operative July 1, 1970.)

**Comment—Judicial Council**

Methods that must be used in an attempt to deliver a copy of the summons and of the complaint to the person or persons to be served are specified in the various sections in this article. In addition, service may be effected by any method authorized by another statute of this state and, when authorized by Section 413.10, by a method specified in a foreign law.

Five separate methods are specified in this article: (1) The traditional method of personal delivery (Section 415.10). (2) Delivery of process to a specified person usually at a defendant's abode or place of business (Section 415.20). (3) Delivery of process by ordinary first-class mail or airmail with return acknowledgement of receipt (Section 415.30). (4) Delivery of process by registered or certified airmail with return receipt (Section 415.40). (5) Service by publication (Section 415.50). Except for delivery by registered or certified mail, these methods may be used to effectuate service either within or outside this state. (Section 413.10.) Service by registered or certified airmail may be used to effectuate service only on a person outside this state. (Section 415.40.)

The persons who are eligible to make such service are specified in Section 414.10, and the persons who are eligible to receive such service are specified in Article 4 (Sections 416.10 through 416.90). Proof of service is governed by Article 5 (Sections 417.10 through 417.30).

Section 415.10 continues the law dealing with hand delivery of process, and declares that such service is complete upon delivery of process to the person or persons to be served. The time within which a defendant must file his responsive pleading is specified in Section 412.20.

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have already vested. Newhall v. Provost (1956) 6 C. 85.

9. Loss of summons after service

If a summons has in fact been served, jurisdiction of the person of the defendant has been secured even though the original is lost after service. Pacific Mutual Life Ins. Co. v. Bugbey (1874) 1 C.U. 971.

10. Return of service as evidence

Unsupported denial by ward after restoration to competency that she had received notice of guardianship proceedings could not overcome presumption of regularity and positive assertions contained in sheriff's return showing that incompetent had been properly served. In re Barker's Guardianship (1950) 223 P.2d 64, 100 C.A.2d 69.

A "return" is the evidence by which the court is informed that the defendant has been given notice to appear in court. Frohman v. Bonelli (1949) 204 P.2d 890, 91 C.A.2d 255.

Certified copy of the summons and return showing personal service upon defendants at a specified time and place together with testimony of process server as to the service and identifying defendants as the persons served was sufficient proof of service of process to establish jurisdiction of justice's court over persons of defendants. Crenshaw v. Smith (1946) 168 P.2d 752, 74 C.A.2d 255.

In justice's court suit, officer's return, showing service of process on defendant in township wherein court is located, is prima facie evidence of defendant's residence therein. Schuler-Knox Co. v. Smith (1944) 141 P.2d 47, 62 C.A.2d 66.

In an action against a company, the return of a sheriff on the summons that he had served it on one P., one of the partners and associates of the company, is prima facie evidence that P. was such partner and associate. Wilson v. Spring Hill Quartz Min. Co. (1858) 10 C. 445.

The officer's return on the summons is evidence of the service. Denmark v. Liening (1858) 10 C. 93.

11. Presumptions

In suit to quiet title to land acquired by defendant in partition and purchased by plaintiff at sheriff's sale, in view of recitals of service in partition suit, it will be presumed that defendant was personally served in such suit, and that judgment is binding upon him, although naming him as "Kinney" instead of "Kenney." Bank of Commerce & Trust Co. v. Kenney (1917) 165 P. 8, 175 C. 59.

Where the affidavit of service of summons is defective, it will be presumed in support of a judgment based thereon that the court received other evidence which established that service was properly made. Welsh v. Koch (1907) 91 P. 604, 4 C.A. 571.

Where summons was served by publication after the original summons was returned, it would be presumed, in the absence of anything appearing to the contrary on the face of the record, that an alias summons was issued. Boyer v. Pacific Mut. Life Ins. Co. (1905) 81 P. 671, 1 C.A. 84.

Where the return of a sheriff states that he served defendant with a certified copy of the complaint, the clerk being the only one allowed to certify such copies, it will be presumed that the certification was by him. Curtis v. Herrick (1859) 14 C. 117, 73 Am.Dec. 632.

## § 417.40 Proof of service signed by registered process server; additional contents

Any proof of service which is signed by a person registered under Chapter 16 (commencing with Section 22350) of Division 8 of the Business and Professions Code or his employee or independent contractor shall indicate the county in which he is registered and the number assigned to him pursuant to Section 22355 of the Business and Professions Code.

(Added by Stats.1971, c. 1661, p. 3578, § 3, operative July 1, 1972.)

Cross References

Applicability of procedural provisions to all trial courts, exceptions, see § 34.
State license tax, action to collect, applicability of this section, see Business and Professions Code § 16222.



Law Review Commentaries

Legislative changes in service of process. (1969) 10 Santa Clara L. 192.

Service of process. (1956) 29 So.Cal.L.R. 103.

Library References

Process ⇐149.

C.J.S. Process § 103.

## § 418. Unconstitutional

Historical Note

Section 418 was added by the 1901 revision act, Stats.1901, c. 102, p. 132, § 68. However, on the authority of Lewis v. Dunne (1901) 66 P. 478, 134 C. 291, 55 L.R.A. 833, 86 Am.St.R. 257, the 1901 revision act was unconstitutional and void.

# Chapter 5

# OBJECTION TO JURISDICTION

Sec.

418.10 Motion to quash service of summons or to stay or dismiss action; procedure.

*Chapter 5 was added by Stats.1969, c. 1610, p. 3363, § 3, operative July 1, 1970.*

## § 418.10 Motion to quash service of summons or to stay or dismiss action; procedure

(a) A defendant, on or before the last day of his time to plead or within such further time as the court may for good cause allow, may serve and file a notice of motion either or both:

(1) To quash service of summons on the ground of lack of jurisdiction of the court over him.

(2) To stay or dismiss the action on the ground of inconvenient forum.

(b) Such notice shall designate, as the time for making the motion, a date not less than 10 nor more than 20 days after filing of the notice. The service and filing of the notice shall extend the defendant's time to plead until 15 days after service upon him of a written notice of entry of an order denying his motion, except that for good cause shown the court may extend the defendant's time to plead for an additional period not exceeding 20 days.

(c) If such motion is denied by the trial court, the defendant, within 10 days after service upon him of a written notice of entry of an order of the court denying his motion, or within such further time not exceeding 20 days as the trial court may for good cause allow,

**§ 386. [Person not party to action making claim against defendant: Substitution for defendant: Deposition of delivery of property claimed: Conflicting claims: Answer of defendant in interpleader]**

A defendant, against whom an action is pending upon a contract, or for specific personal property, may, at any time before answer, upon affidavit that a person not a party to the action makes against him, and without any collusion with him, a demand upon such contract, or for such property, upon notice to such person and the adverse party, apply to the court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in court the amount claimed on the contract, or delivering the property or its value to such person as the court may direct; and the court may, in its discretion, make the order; or such defendant may file a verified cross complaint in interpleader, admitting that he has no interest in such amount or such property claimed, or in a portion of such amount or such property and alleging that all or such portion of the amount or property is demanded by parties to such action or cross action and apply to the court upon notice to such parties for an order to deliver such property or portion thereof or its value to such person as the court shall direct. And whenever conflicting claims are or may be made upon a person for or relating to personal property, or the performance of an obligation, or any portion thereof, such person may bring an action against the conflicting claimants to compel them to interplead and litigate their several claims. The order of substitution may be made and the action of interpleader may be maintained, and the applicant or interpleading party be discharged from liability to all or any of the conflicting claimants, although their titles or claims have not a common origin, or are not identical but are adverse to and independent of one another. The amount which plaintiff or cross complainant admits to be payable under a contract may be deposited by him with the clerk of the court at the time of the filing of the complaint or cross complaint in interpleader without first obtaining order of the court therefor.

A defendant named in a complaint to compel conflicting claimants to interplead and litigate their claims, or a defendant named in a cross complaint in interpleader, may, in lieu of or in addition to any other pleading, file an answer to the complaint or cross complaint which shall be served upon all other parties to the action and which shall contain allegations of fact as to his ownership of or other interest in the amount or property and any affirmative defenses and the relief requested. The allegations in such answer shall be deemed denied by all other parties to the action, unless otherwise admitted in the pleadings.

Any interest on amounts deposited and any right to damages for detention of property so delivered, or its value, shall cease to accrue after the date of such deposit or delivery.

Except in cases where by the law a right to a jury trial is now given, conflicting claims to funds or property or the value thereof so deposited or delivered shall be deemed issues triable by the court, and such issues may be first tried. In the event the amount deposited shall be less than the amount claimed to be due by one or more of the conflicting claimants thereto, or in the event the property or the value thereof delivered is less than all of the property or the value thereof claimed by one or more of such conflicting claimants, any issues of fact involved in determining whether there is a deficiency in such deposit or delivery shall be tried by the court or a jury as provided in Title 8 (commencing with Section 577) of Part 2 of this code.

Enacted 1872; Amended Stats 1881 ch 23 § 1; Stats 1951 ch 1142 § 1; Stats 1970 ch 563 § 1.

Prior Law: Based on Stats 1854 ch 54 § 70 p 72, which read: "A defendant, against whom an action is pending upon a contract, for specific personal property, may, at any time before answer upon affidavit that a person not a party to the action makes against him, and without any collusion with him, a demand upon the same contract, or for the same property, upon due notice to such person, and the adverse party apply to the court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in court the amount claimed on the contract, or delivering the property or its value to such person as the court may direct, and the court may, in its discretion, make the order."

Amendments:

1881 Amendment: Prior to 1881 the section read: "A defendant against whom an action is pending upon a contract, or for specific personal property, may, at any time before answer, upon affidavit that a person not a party to the action makes against him, and without any collusion with him, a demand upon the same contract, or for the same property, upon notice to such person and the adverse party, apply to the court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in court the amount claimed on the contract, or delivering the property, or its value, to such person as the court may direct; and the court may, in its discretion, make the order."

1881 Amendment (1) substituted "such" for "the same" before "contract" and before "property"; and (2) added two sentences at the end of the section to read: "And whenever conflicting claims are or may be made upon a person for or relating to personal property, or the performance of an obligation, or any portion thereof, such person may bring an action against the conflicting claimants to compel them to interplead and litigate their several claims among themselves. The order of substitution may be made and the action of interpleader may be maintained, and the applicant or plaintiff be discharged from liability to all or any of the conflicting claimants, although their titles or claims have not a common origin, or are not identical, but are adverse to and independent of one another."

1951 Amendment: Amended the section to read: "A defendant, against whom an action is pending upon a contract, or for specific personal property, may, at any time before answer, upon affidavit that a person not a party to the action makes against him, and without any collusion with him, a demand upon such contract, or for such property, upon notice to such person and the adverse party, apply to the court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in court the amount claimed on the contract, or delivering the property or its value to such person as the court may direct; and the court may, in its discretion, make the order; or such defendant may file a verified cross complaint in interpleader, admitting that he

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arbitrarily and discriminatorily refused to approve sale on sole ground that purchaser was member of Negro race. Young v. Netherlands Owners, Inc., D.C.D.C.1969, 306 F.Supp. 1272.

Any victim of specified legal discriminatory usage in sale of housing can enjoin such sale if not consummated or recover as damages difference between actual sales price and any higher price to which housing may have been offered but not sold to person of color, together with all costs, and as against realtors and finance agencies who profit by such transaction recover all commissions received together with reasonable attorney fees. Lakewood Homes, Inc. v. Board of Adjustment of City of Lima, 1970, 298 N.E.2d 470, 23 Ohio Misc. 211, affirmed in part, reversed in part on other grounds 307 N.E.2d 905, 25 Ohio App.2d 125.

35. Estoppel

Negro was not estopped and did not abandon or forfeit any right to file claim for alleged deprivation of rights to have bid by seeking recission of check which constituted return of Negro's deposit after Negro's offer to purchase had been rejected. Sanders v. Lake Lorelei, Inc., D.C.Ohio 1968, 306 F.Supp. 967.

36. Counsel fees

Request made by successful defendant for special damages in discriminatory housing case, apparently related to attorney's fees incurred in defending litigation, would be denied, absent proof that plaintiff pursued his litigation other than in good faith. Haytle v. Decker Realty Co., C.A.Ill.1972, 458 F.2d 376.

Counsel fees would be awarded, in addition to damages, to plaintiffs who prevailed in civil rights suit based on alleged unlawful racial discrimination by using a knowingly false pretext in refusing to rent an apartment. Knight v. Auciello, C.A.Mass.1972, 453 F.2d 852.

Negro plaintiff who was deprived of civil rights by developer's refusing to sell lot on same terms as lots were sold to white was entitled to recover attorney fees, to further policy of encouraging private litigation to enforce statutory provision. Lee v. Southern Home Sites Corp., C.A.Miss.1971, 444 F.2d 143.

Attorney fees are part of effective remedy court should fashion to carry out congressional policy embodied in this section prohibiting discrimination in transfer of property. Id.

Award of attorney fees in civil action for damages under this section must be considered in light of damages awarded to plaintiff. Brown v. Ballas, D.C.Tex. 1971, 331 F.Supp. 1033.

37. Damages

White tenants who were evicted from apartment allegedly because they had Negro guests were entitled to exemplary damages from apartment manager where there was evidence that manager acted with malice. Walker v. Pointer, D.C. Tex.1969, 304 F.Supp. 56.

38. Review

Alleged violation of this section, not raised during trial of action against operator of apartment unit during trial, could not be raised on appeal. U. S. v. West Peachtree Tenth Corp., C.A.Ga.1971, 437 F.2d 221.

## § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

R.S. § 1979.

### Historical Note

**Derivation.** Act Apr. 20, 1871, c. 22, § 1, 17 Stat. 13.



### Cross References

Citizenship clause, see U.S.C.A.Const. Amend. 14, § 1.
Conspiracy to interfere with civil rights, damages for, see section 1985 of this title.
Jurisdiction of district courts of civil rights actions, see section 1343 of Title 28, Judiciary and Judicial Procedure.
Privileges and immunities clauses, see U.S.C.A.Const. Art. 4, § 2, cl. 1 and Amend. 14, § 1.

### Federal Rules of Civil Procedure

One form of action, see rule 2, Title 28, Judiciary and Judicial Procedure.
Rules as governing the procedure in all suits of a civil nature whether cognizable as cases at law or in equity or admiralty, see rule 1.

### Library References

Civil Rights ⇐13.5.

### West's Federal Forms

Allegations of jurisdiction, see §§ 1057, 1060.
Complaint, see §§ 1849, 1850, 1850.10, 1851.
Declaratory judgments, see § 4781 et seq.
Preliminary injunctions and temporary restraining orders, matters pertaining to, see § 5271 et seq.
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### Notes of Decisions

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#### I. GENERALLY

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1. Constitutionality

Congress has power to enforce Fourteenth Amend. by action against [illegible] A.Const. Amend. 14 against [illegible] Monroe v. Pape, 1961, 81 S.Ct. 473, 365 U.S. 167, 5 L.Ed.2d 492.

An action against an operator of a recreational under section 2 of Act Mar. 1, 1875, c. 114, 18 Stat. 336, which was now classified to the Code but which provided for a statutory penalty for deprivation of civil rights, based upon alleged denial of service to a prospective guest because the plaintiff was a Negro, was properly dismissed in view of the unconstitutionality of the statutory provisions as applied to private infringements of racial discrimination. Williams v. Hot Shoppes, Inc., 1943, 293

SUBCHAPTER 1.—GENERALLY—Continued

## § 1985. Conspiracy to interfere with civil rights—Preventing officer from performing duties

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

**Obstructing justice; intimidating party, witness, or juror**

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

**Depriving persons of rights or privileges**

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any





lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

R.S. § 1980.

### Historical Note

**Derivation.** Acts July 31, 1861, c. 33, 12 Stat. 284; Apr. 20, 1871, c. 22, § 2, 17 Stat. 13.

### Cross References

Conspiracy against rights of citizens, see section 241 of Title 18, Crimes and Criminal Procedure.
Conspiracy to commit offense or to defraud United States, see section 371 of Title 18.
Conspiracy to impede or injure officer, see section 372 of Title 18.
Deprivation of rights under color of law, see section 242 of Title 18.
Equal protection, see U.S.C.A.Const. Amend. 14, § 1.
Jurisdiction of district courts of civil rights actions, see section 1343 of Title 28, Judiciary and Judicial Procedure.
Obstruction of justice, see section 1501 et seq. of Title 18, Crimes and Criminal Procedure.
Privileges and immunities, see U.S.C.A.Const. Art. 4, § 2, cl. 1, and Amend. 14, § 1.
Universal male suffrage, see U.S.C.A.Const. Amend. 15.
Woman suffrage, see U.S.C.A.Const. Amend. 19.

### Library References

Conspiracy ⇐⇒9.5, 29.6. C.J.S. Conspiracy § 1 et seq.

### West's Federal Forms

Allegations of jurisdiction, see §§ 1057, 1060.
Complaint, see § 1850 Comment.

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**PROOF OF SERVICE**

(Use separate proof of service for each person served)

I served the notice of entry of judgment on sister state judgment as follows: (Type or print)

1 Judgment debtor's name

2 Person served and title

3 Person with whom left and title or relationship to person served

4 Date and time of delivery

5 Manner date, type of mail and place of mailing

6 Address (city and state (when not same as above) whether address is home or business)

7 Manner of service: (Check proper box)

☐ (Personal service) By personally delivering copies to the person served (CCP 415.10)

☐ (Substituted service on corporation, unincorporated association (including partnership), or public entity) By leaving during usual office hours copies in the office of the person served with the person who apparently was in charge and thereafter mailing (by first-class mail, postage prepaid) copies to the person served at the place where the copies were left (CCP 415.20)

☐ (Substituted service on natural person, minor, ward, or conservatee) By leaving copies at the dwelling house, usual place of abode, or usual place of business of the person served in the presence of a competent member of the household or a person apparently in charge of his office or place of business, at least 18 years of age, who was informed of the general nature of the papers, and thereafter mailing (by first-class mail, postage prepaid) copies to the person served at the place where the copies were left (CCP 415.20) (Note: Attach separate declaration or affidavit stating acts relied on to establish reasonable diligence in first attempting personal service.)

☐ (Mail and acknowledgment service) By mailing (by first-class mail or airmail, postage prepaid) copies to the person served, together with two copies of the form of notice and acknowledgment and a return envelope (postage prepaid, addressed to the sender) (CCP 415.30) (Attach completed notice and acknowledgment of receipt.)

☐ (Certified or registered mail service) By mailing to address outside California (by registered or certified mail with return receipt requested) copies to the person served (CCP 415.40) (Attach signed return receipt or other evidence of actual delivery to the person served.)

☐ (Other—CCP 415.10, 415.30, 417.10–417.30—Attach separate page if necessary) ☐ Attached

8 The following notice appeared on the copy of the notice of entry of judgment on sister state judgment served (CCP 412.30 or 474)

☐ You are served as an individual judgment debtor

☐ You are served under the fictitious name of

☐ You are served on behalf of

Under ☐ CCP 416.10 (Corporation) ☐ CCP 416.60 (Minor) ☐ Other

☐ CCP 416.20 (Defunct corporation) ☐ CCP 416.70 (Ward)

☐ CCP 416.40 (Association or partnership) ☐ CCP 416.90 (Individual)

9 At the time of service I was at least 18 years of age and not a party to the action

10 Fee for service $ Mileage $ Notary $ Total $

(To be completed in California by process server, other than a sheriff, marshal or constable)

☐ Not a registered California process server (CCP 417.40)

☐ Registered County Number

I certify (declare)* under penalty of perjury that the foregoing is true and correct and that this declaration was executed on (Date)

at (Place) California

(Type or print name, address, and telephone no.)

(To be completed in California by sheriff, marshal or constable)

I certify that the foregoing is true and correct and that this certificate was executed on (Date)

at (Place) California

(Type or print name, title, county and other data as required, Municipal or Justice Court District)

Signature

Signature

*The declaration under penalty of perjury must be signed in California (CCP 2015.5) or in a state that authorizes use of a declaration in lieu of an affidavit, otherwise, an affidavit is required.

**Law Revision Commission Comment**

**1974 Addition**

Section 1710.30 requires the judgment creditor to serve notice of entry of judgment promptly. In proceedings under this chapter, the court clerk does not send notice of entry of judgment as provided in Section 664.5.

Ordinarily, service of notice of entry of judgment must be made at least 30 days before a writ of execution may issue. See Section 1710.45(a) and Comment. However, in certain circumstances, the judgment debtor may be served with a writ of execution before he is served with notice of entry of judgment. See Section 1710.45(c), and Comment. See also Code Civ. Proc. § 682.1 (service of writ on judgment debtor).

**Underline** indicates changes or additions by amendment



subdivision (b) is added to Section 1710.- to provide the manner of recovering the cost of serving the notice of entry of judgment on the judgment debtor. This cost is assessed in the same manner as, for example, the cost of serving a writ of execution under Section [illegible]. See Govt.Code § 26721 (basic fee for service of a notice).

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1977 Amendment. Added subd. (b).

**Library References**

Recommendations relating to sister state money judgments, 13 Cal.L.Rev.Comm.Reports 1649 (1976).

**§ 1710.35 Effect of entry; enforcement**

Except as otherwise provided in this chapter, a judgment entered pursuant to this chapter shall have the same effect as a money judgment of a superior court of this state and may be enforced or satisfied in like manner.

(Added by Stats.1974, c. 211, p. 407, § 3.)

**Law Revision Commission Comment**

**1974 Addition**

Section 1710.35 provides that a judgment entered pursuant to this chapter is to be treated as a judgment of the superior court for purposes of enforcement. Hence, for example, the provisions of this code regarding judgment liens (Section 674), execution (Sections 681–713½), and supplemental proceedings (Sections 714–723) apply to the judgment. However, some variations may exist between the enforcement procedures provided in this chapter and those generally applicable. See, e. g., Section 1710.45. A judgment entered pursuant to this chapter may be enforced after 10 years as provided by Section 685. Likewise, an action may be brought upon a judgment entered pursuant to this chapter. *Cf.* Thomas v. Thomas, 16 Cal.2d 265, 94 P.2d 810 (1939); Atkinson v. Adkins, 91 Cal.App. 424, 266 P. 461 (1928). However, the same sister state judgment may not serve as the basis for entry of more than one California judgment. See Sections 1710.55(b), (c), 1710.60, and the Comments thereto.

**§ 1710.40 Vacation of judgment; motion; entry of another and different judgment, filing**

(a) A judgment entered pursuant to this chapter may be vacated on any ground which would be a defense to an action in this state on the sister state judgment, including the ground that the amount of interest accrued on the sister state judgment and included in the judgment entered pursuant to this chapter is incorrect.

(b) Not later than 30 days after service of notice of entry of judgment pursuant to Section 1710.30, proof of which has been made in the manner provided by Article 5 (commencing with Section 417.10) of Chapter 4 of Title 5 of Part 2, the judgment debtor, on written notice to the judgment creditor, may make a motion to vacate the judgment under this section.

(c) Upon the hearing of the motion to vacate the judgment under this section, the judgment may be vacated upon any ground provided in subdivision (a) and another and different judgment entered, including, but not limited to, another and different judgment for the judgment creditor if the decision of the court is that the judgment creditor is entitled to such different judgment. The decision of the court on the motion to vacate the judgment shall be given and filed with the clerk of court in the manner provided in Sections 632, 634, and 635, except that the court is not required to make any written findings and conclusions if the amount of the judgment as entered under Section 1710.25 does not exceed one thousand dollars ($1,000).

(Added by Stats.1974, c. 211, p. 407, § 3. Amended by Stats.1977, c. 222, p. —, § 4.)

**Law Revision Commission Comment**

**1974 Addition**

Section 1710.40(a) allows the judgment debtor to make a noticed motion to vacate the entry of judgment on any ground which would be a defense to an action in this state on the sister state judgment. Common defenses to enforcement of a sister

Asterisks * * * indicate deletions by amendment

state judgment include the following: the judgment is not final and unconditional (where finality means that no further action by the court rendering the judgment is necessary to resolve the matter litigated); the judgment was obtained by extrinsic fraud; the judgement was rendered in excess of jurisdiction; the judgment is not enforceable in the state of rendition; the plaintiff is guilty of misconduct; the judgment has already been paid; suit on the judgment is barred by the statute of limitations in the state where enforcement is sought. See 5B Witkin, California Procedure Enforcement of Judgments §§ 134-135 at 3549-3559 (2d ed. 1971); Restatement (Second) of Conflict of Laws §§ 103-121 (1971).

Where issued or levied before the [illegible] may be issued or levied before the [illegible] notice of motion period specified in Section 1005 has run, the court may either shorten the time of notice under Section 1005 or grant a stay of enforcement under Section 1710.50 in order to prevent execution before the judgment debtor's motion can be heard. Equitable relief from the judgment may be available in certain circumstances after the time for making a motion to vacate has expired. See 5 B. Witkin, California Procedure Attack on Judgment in Trial Court § 175 at 3744-3745 (2d ed. 1971); Restatement of Judgments §§ 112-120 (1942).

### Legislative Committee Comment—Senate 1977 Amendment

Subdivision (a) of Section 1710.40 is amended to make clear that the judgment debtor may seek to have the judgment entered in California vacated on the ground that the amount of interest allowed on the sister state judgment is incorrect.

Subdivision (c) is new. The first sentence of subdivision (c) makes clear that the court may enter a different judgment in appropriate cases, e. g., where the principal amount of the judgment or the interest thereon has been incorrectly stated but it is clear that the judgment creditor is entitled to a judgment in California in a different amount. Compare Section 663.

The second sentence of subdivision (c) makes clear that the court must make findings if findings are requested unless the judgment as entered in California is for $1,000 or less. The $1,000 or less exclusion is drawn from the comparable exclusion found in Section 632.

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**1977 Amendment.** Included interest provision in subd. (a); and added subd. (c).

**Library References**

Recommendations relating to enforcement of sister state money judgments. 11 Cal.L.Rev.Comm.Reports 453 (1973); 13 Cal. L.Rev.Comm.Reports 1 (1975), 1671 (1976) 14 Cal.L.Rev.Comm.Reports 81 (1977).

Recommendations relating to sister state money judgments, 13 Cal.L.Rev.Comm.Reports 1649 (1976), 14 Cal.L.Rev.Comm.Reports 81 (1977).

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**1. In general**

Where New York higher education assistance corporation, which had allegedly made an unsecured student loan to maker, obtained New York summary judgment against maker, where New York court had jurisdiction over subject of action and jurisdiction over parties, who both appeared, and where maker, on motion to vacate California judgment enforcing New York judgment, alleged extrinsic fraud in the obtaining of the New York judgment, but maker failed to make any evidentiary showing that he had a meritorious defense to the New York action, it was error to set aside California judgment enforcing New York judgment, despite maker's allegation that necessary process was not served. New York Higher Ed. Assistance Corp. v. Siegel (1979) 154 Cal.Rptr. 350, 91 C.A.3d 686.

Judgment debtor's status as author of allegedly defamatory article inserted in publisher did not create legal distinction invalidating South Dakota court's jurisdiction over judgment debtor under long-arm statute. McElvey v. Brightman (1976) 145 Cal. Rptr. 166, 76 C.A.3d 776.

Where judgment debtor wrote story based upon information gathered by him in South Dakota and where judgment debtor's newspaper was sent to small number of subscribers in South Dakota and story was local story of greater interest to residents of South Dakota than to those elsewhere, judgment debtor's purposeful gathering of information in South Dakota and publication of article libeling South Dakota resident, knowing that article would be distributed in South Dakota, justified South Dakota court's assertion of jurisdiction under South Dakota long-arm statute. Id.

If judgment debtor contests judgment creditor's application for entry of judgment on sister state judgment by making a motion to vacate the judgment, corporate judgment creditor could properly argue against the motion before the court only through an attorney. Tom Thumb Glove Co., Inc. v. Han (1978) 144 Cal.Rptr. 30, 74 C.A.3d 7.

Where plaintiff filed application for entry of judgment based on Texas judgment and where such application was filed within ten years after entry of Texas judgment, special proceeding was not barred by § 337.5, despite fact that clerk of superior court entered judgment in accordance with application more than ten years after entry of Texas judgment. Epps v. Russell (1976) 132 Cal.Rptr. 20, 62 C.A.3d 201.

**2. Grounds for vacation**

Because of judgment debtor's default in South Dakota libel action, judgment debtor had right to try jurisdiction issue in California action to enforce South Dakota judgment and to show invalidity of foreign judgment by evidence not before South Dakota court. McElvey v. Brightman (1976) 145 Cal.Rptr. 254, 79 C.A.3d 776.

Fact that defendant was not personally served with notice of entry of judgment pursuant to plaintiff's application for entry of judgment based on previous Texas court judgment until over two months after clerk of superior court entered judgment in accordance with application did not warrant order vacating judgment on ground that notice of entry was not properly served, in view of fact that this section setting forth that defendant failed to suggest any prejudice to him resulting from the delay. Epps v. Russell (1976) 132 Cal.Rptr. 20, 62 C.A.3d 201.

**3. Time**

Defendant's time to move to vacate judgment entered in accordance with application for entry of judgment based on previous Texas court judgment ran from date of service of notice upon defendant, not from date of entry of judgment. Epps v. Russell (1976) 132 Cal.Rptr. 20, 62 C.A.3d 201.

**4. Burden of proof**

Evidence in proceeding on judgment creditor's application for entry of judgment on sister state judgment sustained finding that declarations presented by debtor in support of his contention that creditor had obtained sister state judgment [illegible] that he was entitled to [illegible] ment entered pursuant to sister state judgment, Tom Thumb Glove Co., Inc. v. Han (1978) 144 Cal.Rptr. 30, 74 C.A.3d 7.

**5. Res judicata**

Where Nevada court, which entered judgment against attorney in action to recover fee from attorney for appearance made at attorney's request and on behalf of attorney's client, had acquired jurisdiction under both California and Nevada law, and no valid defense was presented to Nevada judgment, such judgment was *res judicata* as to all issues raised by attorney's motion to vacate clerk's judgment based upon Nevada judgment, including attorney's claim of immunity from service of process. Terrell v. Medak (1978) 144 Cal.Rptr. 223, 78 C.A.3d 636.

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### § 1710.45 Writ of execution; resident and nonresident debtors; sale or distribution of property

(a) Except as otherwise provided in this section, a writ of execution on a judgment entered pursuant to this chapter shall not issue until at least 30 days after the judgment creditor serves notice of entry of the judgment upon the judgment debtor, proof of which has been made in the manner provided by Article 5 (commencing with Section 417.10) of Chapter 4 of Title 5 of Part 2.

(b) A writ of execution may be issued before service of the notice of entry of judgment if the judgment debtor is any of the following:

(1) An individual who does not reside in this state.

(2) A foreign corporation not qualified to do business in this state under the provisions of Chapter * * * 21 (commencing with Section * * * 2100) of Division 1 of Title 1 of the Corporations Code.

(3) A foreign partnership which has not filed a statement pursuant to Section 15700 of the Corporations Code designating an agent for service of process.

(c) The court may order that a writ of execution be issued before service of the notice of entry of judgment if the court finds upon an ex parte showing that great or irreparable injury would result to the judgment creditor if issuance of the writ were delayed as provided in subdivision (a).

(d) Property levied upon pursuant to a writ issued under subdivision (b) or (c) shall not be sold or distributed before 30 days after the judgment creditor serves notice of entry of the judgment upon the judgment debtor, proof of which has been made in the manner provided by Article 5 (commencing with Section 417.10) of Chapter 4 of Title 5 of Part 2. However, if property levied upon is perishable, it may be sold in order to prevent its destruction or loss of value, but the proceeds of the sale shall not be distributed to the judgment creditor before the date sale of nonperishable property is permissible.

(Added by Stats.1974, c. 211, p. 407, § 3. Amended by Stats.1976, c. 641, p. 1508, § 1.2, eff. Jan. 1, 1977.)

### Law Revision Commission Comment 1974 Addition

Subdivision (a) of Section 1710.45 states the general rule which requires service of the notice of entry of judgment at least 30 days before a writ of execution may be issued. A writ of execution may not be issued under subdivision (a) unless proof of service has been filed which shows that the 30-day requirement has been satisfied. Exceptions to subdivision (a) are stated in subdivisions (b) and (c).

Subdivision (b) permits the issuance and levy on a writ of execution before notice against the assets of three types of nonresident debtors. Subdivision (c) permits issuance of a writ upon an ex parte showing that great or irreparable injury would result if the judgment creditor were required to give notice before obtaining a writ of execution. Although the clerk may issue writs of execution against the debtors described in subdivision (b), the creditor must obtain a court order before a writ of execution may issue under subdivision (c). The clerk may rely on the information in the creditor's application in deciding whether a writ of execution may be issued under subdivision (b). See Section 1710.-10(b)(5).

Subdivision (d) provides a special 30-day delay period which gives the judgment

debtor an opportunity to make a motion to vacate the judgment before his property is sold or distributed. See Section 1710.40.

Section 1710.45 does not otherwise affect the general execution procedure.

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1976 Amendment. Substituted, in subd. (b)(2), "Chapter 21 (commencing with Section 2100)" for "Chapter 3 (commencing with Section 6080) of Part 11".

1. In general

Plaintiff, who had obtained Texas judgment against defendant for substantial amount of money, had ten years after date on which clerk of superior court entered judgment in accordance with plaintiff's application for entry of judgment based on Texas judgment within which to effect levy on California judgment of that date. Hoppe v. Russell (1976) 132 Cal.Rptr. 30, 62 C.A.3d 301.

### § 1710.50 Stay of enforcement

(a) The court shall grant a stay of enforcement where:

(1) An appeal from the sister state judgment is pending or may be taken in the state which originally rendered the judgment. Under this paragraph, enforcement shall be stayed until the proceedings on appeal have been concluded or the time for appeal has expired.

(2) A stay of enforcement of the sister state judgment has been granted in the sister state. Under this paragraph, enforcement shall be stayed until the sister state stay of enforcement expires or is vacated.

(3) The judgment debtor has made a motion to vacate pursuant to Section 1710.40. Under this paragraph, enforcement shall be stayed until the judgment debtor's motion to vacate is determined.

(4) Any other circumstance exists where the interests of justice require a stay of enforcement.

(b) The court may grant a stay of enforcement under this section on its own motion, on ex parte motion, or on noticed motion.

(c) The court shall grant a stay of enforcement under this section on such terms and conditions as are just including but not limited to the following:

(1) The court may require an undertaking in an amount it determines to be just, but the amount of the undertaking shall not exceed double the amount of the judgment creditor's claim.

(2) If a writ of execution has been issued, the court may order that it remain in effect.

(3) If property of the judgment debtor has been levied upon under a writ of execution, the court may order the levying officer to retain possession of the property capable of physical possession and to maintain the levy on other property.

(Added by Stats.1974, c. 211, p. 408, § 3.)

#### Law Revision Commission Comment
#### 1974 Addition

Section 1710.50 gives broad discretion to the court to grant a stay of enforcement in the interests of justice. Where the court has adequate information, it may grant the stay on its own motion. Otherwise, the burden is on the judgment debtor to show a need for the stay on ex parte or noticed motion. Subdivision (c) gives the court broad discretion in fashioning the terms of the stay in order to adequately protect the interests of both the judgment creditor and the judgment debtor. Whether an undertaking is to be required, and the amount of the undertaking if one is required, is left to the discretion of the court which may consider factors such as whether (1) a successful defense is probable, (2) it is likely that the debtor will conceal or transfer his assets, (3) the debtor has already given a bond on appeal in the sister state, and (4) the debtor prefers having his property held subject to levy rather than giving an undertaking.

### § 1710.55 Restrictions on entry of judgment

No judgment based on a sister state judgment may be entered pursuant to this chapter in any of the following cases:

(a) A stay of enforcement of the sister state judgment is currently in effect in the sister state.

(b) An action based on the sister state judgment is currently pending in any court in this state.

(c) A judgment based on the sister state judgment has previously been entered in any jurisdiction in this state.

(Added by Stats.1974, c. 211, p. 408, § 3.)



#### Law Revision Commission Comment
#### 1974 Addition

Subdivision (a) of Section 1710.55 prevents the judgment creditor from using the procedures of this chapter to obtain the entry of a judgment based on a sister state judgment where enforcement has been stayed in the sister state. If entry of judgment is obtained in this state before the stay of enforcement of the sister state judgment is granted in the sister state, the judgment debtor may seek to stay enforcement of the California judgment under Section 1710.50(a)(2).

Subdivisions (b) and (c) of Section 1710.55, together with subdivision (b) of Section 1710.60, preclude a judgment creditor from using his sister state judgment as defined in Section 1710.10(c) as the basis for more than one California judgment.

### § 1710.60 Right of action to enforce judgment; exception

(a) Except as provided in subdivision (b), nothing in this chapter affects any right a judgment creditor may have to bring an action to enforce a sister state judgment.

(b) No action to enforce a sister state judgment may be brought where a judgment based on such sister state judgment has previously been entered pursuant to this chapter.

(Added by Stats.1974, c. 211, p. 408, § 3.)

#### Law Revision Commission Comment
#### 1974 Addition

Subdivision (a) of Section 1710.60 is similar to Section 6 of the revised Uniform Enforcement of Foreign Judgments Act of 1964, 9A Uniform Laws Ann. 649 (1965). The enactment of this chapter is not intended to restrict the traditional method of enforcing a sister state money judgment which requires the judgment creditor to bring an independent action in this state. See 5 H. Witkin, California Procedure Enforcement of Judgment § 192 at 3548-3549 (2d ed. 1970); Restatement (Second) of Conflict of Laws §§ 99, 100, Comment b (1971); Restatement of Judgments § 47, Comment c (1942). However, subdivision (b) makes clear that the judgment creditor must choose between the methods of enforcement offered. He may not obtain two money judgments in this state based on one sister state judgment as defined in Section 1710.10(c) by using the two different procedures. See also Section 1710.55(b).

### § 1710.65 Right of action for other than payment of money

The entry of a judgment based on a sister state judgment pursuant to this chapter does not limit the right of the judgment creditor to bring an action based on the part of a judgment of a sister state which does not require the payment of money, nor does the bringing of such an action limit the right of the judgment creditor to obtain entry of judgment based on the sister state judgment pursuant to this chapter.

(Added by Stats.1974, c. 211, p. 408, § 3.)

#### Law Revision Commission Comment
#### 1974 Addition

Section 1710.65 makes it clear that the enforcement of the part of a judgment of a sister state ordering the payment of money pursuant to this chapter is independent of any action on the part of such judgment awarding some other relief and that use of the two separate procedures is not to be regarded as splitting a single cause of action.

of a sister state which is entitled to full faith and credit.

Added Stats 1967 ch 503 § 1.

Collateral References:
Witkin Procedure 2d p 3551.
Cal Jur 2d Judgments §§ 301, 311.
7 Cal Practice, Revival and Action on Judgment §§ 58:23, 58:24.
McKinney's Cal Dig Judgments §§ 477, 479.
47 Am Jur 2d Judgments §§ 1224 et seq.

**§ 1713.4. [When judgment not conclusive]**

(a) A foreign judgment is not conclusive if

(1) The judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law;

(2) The foreign court did not have personal jurisdiction over the defendant; or

(3) The foreign court did not have jurisdiction over the subject matter.

(b) A foreign judgment need not be recognized if

(1) The defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend;

(2) The judgment was obtained by extrinsic fraud;

(3) The cause of action or defense on which the judgment is based is repugnant to the public policy of this state;

(4) The judgment conflicts with another final and conclusive judgment;

(5) The proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court; or

(6) In the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.

Added Stats 1967 ch 503 § 1.

Collateral References:
Witkin Procedure 2d pp 3551, 3552.
Cal Jur 2d Judgments §§ 297 et seq.
7 Cal Practice, Revival and Action on Judgment §§ 58:24, 58:25.
McKinney's Cal Dig Judgments §§ 477 et seq.
47 Am Jur 2d Judgments §§ 1254 et seq.

**§ 1713.5. [When recognition not refused for lack of personal jurisdiction]**

(a) The foreign judgment shall not be refused recognition for lack of personal jurisdiction if



(2) The defendant voluntarily appeared in the proceedings other than for the purpose of protecting property seized or threatened with seizure in the proceedings or of contesting the jurisdiction of the court over him;

(3) The defendant prior to the commencement of the proceedings had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved;

(4) The defendant was domiciled in the foreign state when the proceedings were instituted, or, being a body corporate had its principal place of business, was incorporated, or had otherwise acquired corporate status, in the foreign state;

(5) The defendant had a business office in the foreign state and the proceedings in the foreign court involved a cause of action arising out of business done by the defendant through that office in the foreign state; or

(6) The defendant operated a motor vehicle or airplane in the foreign state and the proceedings involved a cause of action arising out of such operation.

(b) The courts of this state may recognize other bases of jurisdiction.

Added Stats 1967 ch 503 § 1.

Collateral References:
Witkin Procedure 2d p 3552.
Cal Jur 2d Judgments § 300.
7 Cal Practice, Revival and Action on Judgment § 58:25.
McKinney's Cal Dig Judgments §§ 478 et seq.
47 Am Jur 2d Judgments §§ 1254 et seq.

NOTES OF DECISIONS

The trial court properly granted defendant's motion for summary judgment in an action under the Uniform Foreign Money-Judgments Recognition Act (Code Civ Proc, §§ 1713–1713.8) on a money judgment rendered by a Swiss court of general jurisdiction in connection with the sale of goods, where personal jurisdiction over defendant in the Swiss court was claimed on the ground that he had been doing business in Switzerland, where documents mailed to defendant purportedly giving him notice of the pendency of the Swiss action were in German, a language that defendant was unable to read, where accompanying letters in English did not give notice of the nature of the documents enclosed, and where, though plaintiff's affidavit in opposition to defendant's motion asserted that defendant was generally aware that plaintiff intended to take legal action against him, it did not suggest that defendant knew what the documents mailed to him were or how or where they originated. The Swiss court therefore never acquired the basis on which to adjudicate the claim of personal jurisdiction over defendant. Julin v Larson (1972) 25 CA3d 325, 101 Cal Rptr 796.

**§ 1713.6. [Stay on appeal]**

If the defendant satisfies the court either that an appeal is pending or

## CHAPTER 2

### *Stay of Enforcement and Other Proceedings*

§ 916. Stay of proceedings on perfecting appeal: Effect
§ 917.1. Appeal from money judgment, etc.: Necessity for undertaking to stay execution: Requisites and conditions of undertaking
§ 917.2. Appeal from judgment or order for assignment or delivery of document or personal property: Placing property in custody of officer of court: Furnishing undertaking: Judgment or order directing sale of perishable property]
§ 917.3. Appeal from judgment or order directing execution of instruments
§ 917.4. Appeal from judgment or order directing sale, etc., of real property
§ 917.5. Appeal from judgment or order appointing receiver: Undertaking
§ 917.6. Appeal from judgment or order directing performance of acts specified in §§ 917.1–917.5
§ 917.7. Appeal from judgment or order affecting custody or right of visitation of minor or exclusion from family dwelling: Provisions regarding removal of minor from State
§ 917.8. Appeal involving party adjudged guilty of usurpation, etc., of public office, or judgment or order directing right of inspection of corporate books, etc.
§ 917.9. Appeal from judgment or order in cases not provided for in §§ 917.1–917.8: Undertaking
§ 918. Stay of enforcement of judgment or order by trial court: Limitation of power
§ 919. Appeal by executor, administrator, etc.: Dispensation or limitation of security by trial court
§ 920. Deposit in lieu of undertaking: Waiver of undertaking
§ 921. Appeal by party levying attachment: Requisites and conditions of undertaking
§ 922. Sureties on undertaking: Exception to sufficiency: Bond or undertaking for amount greater than required: Obligation recoverable
§ 923. Powers of reviewing court or judge: Chapter provisions as not limiting

**§ 916. [Stay of proceedings on perfecting appeal: Effect]**

**(a) Except as provided in Sections 917.1 through 917.9, the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order.**

**(b) A stay of proceedings shall release from levy property which has been levied upon under execution issued upon such judgment.**

**(c) When there is a stay of proceedings other than the enforcement of the judgment, the trial court shall have jurisdiction of proceedings related to the enforcement of the judgment as matter**



matter embraced in the action and not affected by the judgment or order appealed from.

Added Stats 1968 ch 385 § 2.

**Prior Law: Based on:**

(a) Former § 946 which read: "Whenever an appeal is perfected, as provided in the preceding sections of this chapter, it stays all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein, except in cases involving the custody of minor children which order shall not be stayed, and releases from levy property which has been levied upon under execution issued upon such judgment; provided, however, said property shall not be released from the levy, if the respondent excepts to the sufficiency of the sureties within five days after the giving of the undertaking staying execution until such sureties, or others, justify in the manner prescribed by law; but the court below may proceed upon any other matter embraced in the action and not affected by the order appealed from. And the court below may in its discretion, dispense with or limit the security required by this chapter, when the appellant or moving party is an executor, administrator, trustee, or other person acting in another's right. Neither an appeal nor the pendency nor granting of a motion timely filed and served for vacation of judgment, or for judgment notwithstanding the verdict, or for a new trial, shall continue in force an attachment, unless an undertaking be executed and filed on the part of the appellant or moving party by at least two sureties, in double the amount of the debt claimed by him, that the appellant or moving party will pay all costs and damages which the respondent may sustain by reason of the attachment, in case the order of the court below be sustained in favor of the respondent or against the moving party; and unless, within five days after written notice of the entry of the order appealed from or order denying any of such motions, such appeal be perfected. The amount of the undertaking on appeal required by this section shall be such amount as is fixed by the trial court on motion of the defendant as provided in Section 553 of this code and if no such order shall have been made, the undertaking shall be in double the amount of the debt claimed by the appellant. If the defendant is not satisfied with the undertaking in double the amount of the debt or the amount fixed by order under Section 553, the trial court upon motion of the defendant made within 60 days after perfecting the appeal may order an increase in the amount of the undertaking in such amount as is justified by the detriment reasonably to be anticipated by continuing the attachment. If such an order be made, the attachment shall be discharged and the property released therefrom, unless the undertaking shall be executed and filed by at least two sureties within 10 days after the order is made. The sureties on any undertaking required by this section for the purpose of continuing an attachment may be required to justify before the trial court within 10 days after the undertaking is filed and if they fail to do so, the order of attachment shall be discharged, and the property released therefrom." [Enacted 1872; Amended by Code Amdts 1873–74 ch 383 § 125; Stats 1913 ch 129 § 1; Stats 1955 ch 1407 § 1; Stats 1959 ch 833 § 2.]

(b) Practice Act § 353 (Stats 1851 ch 5 § 353 p 107), as amended by Stats 1865–66 ch 534 § 23 p 707.

(c) NY Code § 339.

**Former Section:** Former § 916 was enacted 1872 and amended and renumbered § 113b by Stats 1933 ch 743 § 26.

**Cross References:**

Extension of time by holidays: § 12a.
When and actions in which attachment may issue: § 537.
Undertaking on attachment: § 539.
Discharge of attachment improperly issued: § 556.
Justification of sureties: § 922.
Form of undertaking by sureties: § 1041.
Extension of time: § 1054.
Money or bonds held

Note 43

In suit for personal injuries, where no evidence was introduced in support of cause of action for damage to motorcycle, and same was dismissed before case was submitted, defendant could not be prejudiced by overruling of his demurrer, although causes of action were improperly joined under this section. Logan v. Lewis (1918) 170 P. 851, 35 C.A. 663.

Where a party, entitled to bring a single action to recover a specified sum, brought two actions therefor, and defendant made no objection thereto and the judgments rendered in the two actions were correct in amount and within the limits of the liability of defendant, the judgments would not be disturbed. J. F. Hall-Martin Co. v. Hughes (1912) 122 P. 617, 18 C.A. 513.

Where a cause of action for breach of contract in one count was improperly joined with another count on a cause of action founded on tort, prejudice would be presumed, since such joinder was expressly forbidden by this section, and it did not affirmatively appear that no injury was done thereby. Stark v. Wellman (1892) 31 P. 258, 96 C. 490.

Whether or not a cause of action to quiet title was improperly joined with one against a trustee of real estate having no beneficial interest, if the plaintiff was entitled to a conveyance from the trustee, and the trustee could have recovered from the other defendant in the cause of action to quiet title, the substantial rights of the parties were not affected, and judgment would not be reversed for such error. Reynolds v. Lincoln (1856) 12 P. 449, 71 C. 133.

## Article 4

## CROSS-COMPLAINTS

Sec.

428.10 Filing of cross-complaint; causes of action.
428.20 Joinder of person as cross-party.
428.30 Joinder of other causes of action by cross-complaint.
428.40 Separate document.
428.50 Filing of cross-complaint; leave of court.
428.60 Service; appearance.
428.70 Definitions.
428.80 Abolition of counterclaims.

*Article 4 was added by Stats.1971, c. 244, p. 380, § 23, operative July 1, 1972.*

Historical Note

Operative date of 1971 addition and applicability of Article 4 to actions commenced on or after July 1, 1972, see, Historical Note under § 117h.

### § 428.10 Filing of cross-complaint; causes of action

A party against whom a cause of action has been asserted in a complaint or cross-complaint may file a cross-complaint setting forth either or both of the following:

(a) Any cause of action he has against any of the parties who filed the complaint or cross-complaint against him. Nothing in this subdivision authorizes the filing of a cross-complaint against the plaintiff in an action commenced under Title 7 (commencing with



(b) Any cause of action he has against a person alleged to be liable thereon, whether or not such person is already a party to the action, if the cause of action asserted in his cross-complaint (1) arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause brought against him or (2) asserts a claim, right, or interest in the property or controversy which is the subject of the cause brought against him.

(Added by Stats.1971, c. 244, p. 380, § 23, operative July 1, 1972.)

Legislative Committee Comment—Assembly

1971 Addition

Section 428.10 reflects the fact that a cross-complaint is the only type of pleading that may be filed to request relief by a party against whom a complaint or cross-complaint has been filed. It should be noted that, if the cause arises out of the same transaction or occurrence, the cross-complaint is compulsory. See Section 426.30. Counterclaims have been abolished. Section 428.80.

Subdivision (a) adopts the simple rule that a party against whom a complaint or cross-complaint has been filed may bring any cause of action he has (regardless of its nature) against the party who filed the complaint or cross-complaint. There need be no factual relationship between his cause and the cause of the other party. This is the rule under the Federal Rules of Civil Procedure and other modern provisions. *E. g.*, Fed.R.Civ.Proc. Rule 13. Third persons may be joined pursuant to Section 428.20.

Subdivision (b) does not, of course, limit the right of a party against whom a cause of action has been asserted to join unrelated causes of action when filing a cross-complaint under subdivision (a) against the party who asserted the cause against him. Subdivisions (a) and (b) are completely independent provisions, and it is necessary only that the person seeking to file the cross-complaint come within the provisions of one of the subdivisions.

Subdivision (a) is generally consistent with prior law (former Code of Civil Procedure Section 438) which provided for a counterclaim; but, under prior law, some causes which a party had against an opposing party did not qualify as counterclaims because they did not satisfy the "diminish or defeat" or "several judgment" requirements. These requirements are not continued, and subdivision (a) permits unlimited scope to a cross-complaint against an opposing party. For discussion of the prior law, see the Comment to Section 426.30 and Friedenthal, Joinder of Claims, Counterclaims, and Cross-Complaints: Suggested Revision of the California Provisions, 23 Stan.L.Rev. 1, 19-23 (1970).

Subdivision (b) continues the rule (former Code of Civil Procedure Section 442) that a cross-complaint may be asserted against any person, whether or not a party to the action, if the cause of action asserted in the cross-complaint arises out of the same transaction or occurrence or involves the same property or controversy (see, discussion in Comments to sections 378, 379, and 426.10). Subdivision (b) thus permits a party to assert a cause of action against a person who is not already a party to the action if the cause has a subject matter connection with the cause already asserted in the action. For further discussion, see Friedenthal, *supra*, at 25–26.

Section 428.10 restricts cross-complaints in eminent domain actions to those that assert a cause of action arising out of the same transaction or occurrence or that involve the same property or controversy. Subdivision (a) which permits assertion of unrelated causes of action is made specifically inapplicable to eminent domain actions; but subdivision (b), which permits assertion of related causes, is applicable.

Any undesirable effects that might result from joinder of causes under Section 428.10 may be avoided by severance of causes or issues for trial under Section 1048 of the Code of Civil Procedure.

### Historical Note

Derivation: Former section 427, enacted 1872, amended by Stats.1907, c. 372, p. 705, § 2; Stats.1913, c. 135, p. 219, § 1; Stats.1915, c. 28, p. 30, § 1; Stats.1931, c. 324, p. 696, § 1; Stats.1961, c. 689, p. 1726, § 8.

Former section 438, enacted 1872, amended by Stats.1927, c. 813, p. 1630, § 1.

Former section 441, enacted 1872.

Former section 442, added by Code Am. 1873–74, c. 383, p. 301, § 54, amended by Stats.1907, c. 372, p. 706, § 6; Stats.1909, c. 629, p. 966, § 1; Stats.1915, c. 141, p. 298, § 1; Stats.1923, c. 376, p. 756, § 1.

Stats.1851, c. 5, pp. 57 to 59, §§ 47, 49, 64; Stats.1856, c. 155, p. 196; Stats.1860, c. 314, p. 298.

### Cross References

Applicability of procedural provisions to all trial courts, exceptions, see § 34.
Cross-complaint beyond jurisdiction, transfer of case, see § 396.
Cross-demands, see § 431.70.
Dismissal where there is a cross-complaint, see § 581.
Divorce, residence of cross-complainant, see Civil Code § 4530.
Effect of failure to set up cross-complaint, see § 426.30.
Judgment on cross-complaint exceeding plaintiff's demand, see § 666.
Justice court, cross-complaint in, see § 422.20.
New matter in answer deemed controverted, see § 431.20.
Permitted pleadings, see § 422.10.
Requisites of original complaint, see § 422.30 et seq.
Trial of special defenses pleaded in answer to cross-complaint, see § 597.

### Law Review Commentaries

Action by third party beneficiary, right of promisor to set-off or counterclaim demands against the promisee. (1929) 27 C.L.R. 497, 520.

Appealability of order striking cross-complaint. (1963) 16 Hastings L.J. 111.

Automatic setoff of cross demands under statute. (1964) 42 C.L.R. 897.



Bank's right to setoff against a debt secured by realty—is it a bird in the hand or a bird in the bush? Robert J. Brookstone (1968) 44 Los Angeles Bar Bull. 249.

Bank's right to set-off against a secured loan of a depositor. (1947) 35 C.L.R. 118.

Banks, set-off of deposits. (1923) 11 C.L.R. 111, 113.

Comment on nature of cross-actions. (1934) 22 C.L.R. 635.

Comparison of the cross-complaint and the counterclaim in California. (1950) 3 Stan.L.R. 99.

Compensatio: Automatic extinction of cross-demands. (1965) 53 C.L.R. 324.

Counterclaim: filing against non-resident. 4 U.C.L.A.Law Rev. 271. (1957).

Counterclaims, cross-complaints, and confusion. (1950) 3 Stanford L.R. 99.

Counterclaim and cross-complaint compared and contrasted. (1937) 10 So.Cal. L.R. 415.

Counterclaims for personal injury and property damage resulting from a single act. (1934) 23 C.L.R. 101.

Courts having jurisdiction of cross-demands. (1941) 29 C.L.R. 765.

Cross-demands: California procedure and the Federal Rules. (1956) 1 U.C.L.A. Law R. 647.

Demurrer to cross-complaint. (1939) 13 So.Cal.L.R. 6.

Distinctions between and overlapping of counterclaims and cross-complaints. (1950) 3 Stan.L.R. 93.

Effect of a statute of limitations upon the right to assert a counterclaim. (1943) 31 C.L.R. 210.

Equitable defenses in law actions in federal courts. (1929) 17 C.L.R. 591.

Ex parte matters relating to the pleadings. Clinton Rodda (1965) 41 Los Angeles Bar Bull. 97.

Joinder of actions with special reference to the Montana and California practice. (1930) 18 C.L.R. 459.

Judgments subject to set-off. (1922) 10 C.L.R. 422, 434.

Necessity of cross-complaint and effect of unnecessary cross-complaint. (1913) 1 C.L.R. 82.

Problems encountered in permitting excessive attachment victim to recover in cross-action for abuse of process, as opposed to separate, subsequent action for malicious prosecution. (Fall 1968) 9 Santa Clara Lawyer 132.

Proceeding on a cross-pleading after dismissal of plaintiff's action. (1952) 25 So. Cal.L.R. 226.

Relationship between counterclaim and set-off to foreclosure of a mortgage are discussed in (1927) 25 C.L.R. 247.

Res judicata; counterclaims, cross-claims and failure to set up counterclaim. (1952) 40 C.L.R. 412, 422.

Right to assert counterclaims for personal injuries and property damage resulting from a single act. (1931) 23 C.L.R. 101.

Scope of statutory provisions for pleading counterclaims. (1926) 14 C.L.R. 363, 365.

Set-off against insolvent bank. (1933) 6 So.Cal.L.R. 233.

Set-off and counterclaim in mortgage foreclosure action. (1937) 25 C.L.R. 347, 352.

Suggested revision of California provisions as to joinder of claims, counterclaims, and cross-complaints. Jack H. Friedenthal (1970) 23 Stan.L.R. 1.

Tendency to diminish or defeat plaintiff's recovery as basis for counterclaim. (1930) 18 C.L.R. 459, 478.

Transactional cross-complaints. William A. Masterson (1968) 35 Los Angeles Bar Bull. 249.

Waiver by a bank of a right to set-off garnished deposit against depositor's indebtedness. (1937) 25 C.L.R. 148.

### Library References

Pleading ⇨138.
C.J.S. Pleading § 167.
Recommendation and study relating to counterclaims and cross-complaints, joinder of causes of action, and related provisions. 10 Cal.L.Revision Comm. Reports 501 (1971); Report of Senate Committee on Judiciary on Senate Bill 301, S. Journal, April 1, 1971; Communication From Assembly Committee on Judiciary on Senate Bill 301, A. Journal, June 14, 1971.

...ance. Atherley v. MacDonald, ... Inc. (1966) 237 P.2d 629, ... 328.

...proper circumstances, relief may ... by the filing of a cross-complaint ...tion and delivery action, and new ... may be brought in under a cross- ...ed where it appears that their pres- ...ssential to the complete determi- ...of the controversy already before ... Spencer Kennedy, Limited, v. ...of America Nat. Trust & Sav. Ass'n ... P.2d 552, 19 C.2d 586.

...new party not necessary to the deci- ...of the matter before the court could ...to be brought into a case by a cross-com- ...plaint authorized by former § 442. Reed v. ... (1914) 144 P. 944, 168 C. 706.

Under former § 442, a defendant could not introduce new parties by way of cross-complaint. Clark v. Keller (1913) 134 P. 846, 163 C. 207.

Under former § 442, defendant properly could join third person with plaintiff as a party defendant to the cross-complaint. Goodell v. Verdugo Cañon Water Co. (1903) 71 P. 354, 138 C. 308.

New parties may be brought in by defendant on a cross bill, if the cause of action to which they are made parties defendant is the proper subject of a cross complaint. Stockton Savings & Loan Soc. v. Harrold (1900) 60 P. 165, 127 C. 612.

## § 428.30 Joinder of other causes of action by cross-complainant

Where a person files a cross-complaint as authorized by Section 428.10, he may unite with the cause of action asserted in the cross-complaint any other causes of action he has against any of the cross-defendants, other than the plaintiff in an eminent domain proceeding, whether or not such cross-defendant is already a party to the action.

(Added by Stats.1971, c. 244, p. 381, § 23, operative July 1, 1972.)

### Legislative Committee Comment—Assembly

#### 1971 Addition

Section 428.30 provides permissive joinder rules that treat a cross-complaint generally the same as a complaint in an independent action. *Cf.* Section 427.10. Thus, with a single exception, if a party files a cross-complaint against either an original party or a stranger or both, he may assert in his cross-complaint any additional causes of action he has against any of the cross-defendants. See the Comment to Section 427.10. The exception is the filing of a cross-complaint against the plaintiff in an eminent domain action. In such a case, the cross-complaint may state only those causes of action which arise out of the same transaction or occurrence or involve the same property or controversy. See Section 428.10. Any undesirable effects that might result from joinder of causes under Section 428.30 may be avoided by severance of causes or issues for trial under Section 1048.

### Law Review Commentaries

Comparison of the cross-complaint and the counterclaim in California. (1950) 3 Stan.L.R. 99.

Cross-demands: California procedure and the Federal Rules. (1954) 1 U.C.L.A. Law R. 547.

Courts having jurisdiction of cross-demands. (1941) 29 C.L.R. 761.

### Library References



## § 428.40 Separate document

The cross-complaint shall be a separate document.

(Added by Stats.1971, c. 244, p. 381, § 23, operative July 1, 1972.)

### Law Revision Commission Comment

#### 1971 Addition

Section 428.40 requires the cross-complaint to be a separate document. Under prior practice, a counterclaim could be a part of the answer. However, the counterclaim is now abolished. See Section 428.80.

### Law Review Commentaries

Counterclaims, cross-complaints, and confusion. (1950) 3 Stanford L.R. 99.

Cross-demands: California procedure and Federal Rules. (1954) 1 U.C.L.A. Law R. 547.

### Library References

Pleading ⇐147.

C.J.S. Pleading § 174.

### Notes of Decisions

1. In general

Cross-complaint is pleading separate and apart from answer, and is required to be complete and sufficient in itself, and cannot be aided by averments of answer. Luse v. Peters (1934) 28 P.2d 257, 219 C. 625.

## § 428.50 Filing of cross-complaint; leave of court

A party shall obtain leave of court to file any cross-complaint except one filed before or at the same time as his answer to the complaint or cross-complaint. Such leave may be granted in the interest of justice at any time during the course of the action.

(Added by Stats.1971, c. 244, p. 381, § 23, operative July 1, 1972.)

### Legislative Committee Comment—Senate

#### 1971 Addition

The first sentence of Section 428.50 continues the substance of a portion of former Code of Civil Procedure Section 442 except that it makes clear that a cross-complaint may be filed "before" as well as at the same time as the answer. As under former Section 442, permission of the court is required to file a cross-complaint subsequent to the answer. The language "may be granted" of Section 428.50 places the question of leave to file a cross-complaint after the answer wholly in the discretion of the court; it is to be distinguished from the mandatory language "shall grant" of Section 426.50 relating to compulsory